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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

UNITED STATES OF AMERICA, Petitioner, vs. ROBERT ESNAULT-PELTERIE, Respondent.	No. 963.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement.

The petition prays that a writ of certiorari issue to the Court of Claims of the United States directing that the above-entitled cause be submitted to this Court for review. The findings of fact, conclusions of law, opinion, and judgment of the Court of Claims have not yet been reported. They are before this Court in the transcript of record.

The petition is based on the grounds (1) that there is a conflict between the decision of the Court of Claims and that of the Circuit Court of Appeals for the Second Circuit in *Esnault-Pelterie* v. *Chance Vought Corporation,* 66 Fed. (2d) 474; (2) that the questions of validity and construction of the patent and its infringement are of momentous importance both to the Government and to the entire aircraft industry; (3) that a judgment (interlocutory) has been entered; and (4) that the decision of the Court of Claims is erroneous.

Substance of the Question Involved in This Petition.

Will this Court review a Court of Claims case, such as the case at bar, wherein the facts found must be taken as correct, and wherein there are no legitimate errors of law alleged by the petitioner? Or will this Court refuse such review unless shown that the Court of Claims erred in some point of law of general importance?

We submit the answer should be "No" to the first question, and "Yes" to the second.

Short Statement of Reasons Why the Petition Should Be Denied.

1. Under Section 288, Title 28, U. S. C., and the decisions of this Court, the Court of Claims is the final arbiter of the facts, and the power of review of this Honorable Court is limited to questions of law.

2. Under the decisions of this Court the questions as to whether a patent is valid and how it should be construed in view of the prior art are questions of fact.

3. Under this Court's decisions the question as to whether a patent is infringed is a question of fact.

4. The first question of law presented in the petition (Q. 4, p. 2) is clearly fictitious, being based upon misstatements of fact.

5. The second question of law presented in the petition (Q. 5, p. 2) is also fictitious, being based upon misstatements of fact.

6. The third and last question of law presented in the petition (Q. 7, p. 3) is fictitious because it asks this Court to alter by judicial construction the provisions of Section 4923, R. S., the substance of which has been present in our law for the last hundred years.

7. There is nothing of merit presented in this case except the plain questions as to whether or not the patent in suit is valid in view of the prior art and is infringed by defend-

ant's structures. Both of these questions are found in the affirmative by the Court of Claims.

We will now refer to these seven propositions under similar headings.

1.

Findings of Fact of the Court of Claims Are Not Subject to Review.

THE LAW. Section 288 (Title 28, U. S. C.), so far as relates to the question at hand, is as follows:

> "(b) In any case in the Court of Claims, including those begun under section 287, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause, including the findings of fact and the judgment or decree, but omitting the evidence, be certified to it for review and determination with the same power and authority, and with like effect, as if the cause had been brought there by appeal."

This statute was passed on February 13, 1925. Prior to that date the Supreme Court had appellate jurisdiction over judgments or decrees of the Court of Claims. The significant provision of the clause just quoted is that the evidence is omitted, the findings of fact only being certified to this Court, together with the judgment or decree.

THE DECISIONS OF THIS COURT. Recognizing these principles, this Court in *Luckenbach* v. *United States*, 272 U. S. 533, stated (p. 537):

> "Save in special cases not needing present mention, Congress never has provided for a general review by this court of cases coming from the Court of Claims. On the contrary—and probably because that court is composed of five judges, all usually hearing cases together and the concurrence of three being necessary to a decision in any case—Congress has pursued the policy of permitting only a limited review on questions of law: * * *."

Again, on page 538:

> "This court uniformly has regarded the legislation and rules as confining the review to questions of law *shown by the record when made up as the rules direct.* * * *" (Italics ours.)

Other decisions could be cited to the same effect. In passing over these, however, we would refer briefly to the latest decision of this Court on a similar point, dated April 27, 1936, in *St. Joseph Stock Yards Co.* v. *United States,* No. 497, October Term, 1935. In this decision, which is reported in Vol. 80, No. 14 of the Supreme Court Law Ed. Advance Opinions, page 679, the Court stated:

> "* * * When the legislature itself acts within the broad field of legislative discretion, its determinations are conclusive. When the legislature appoints an agent to act within that sphere of legislative authority, it may endow the agent with power to make findings of fact which are conclusive, provided the requirements of due process which are specially applicable to such an agency are met, as in according a fair hearing and acting upon evidence and not arbitrarily" (authorities cited—p. 685).

If this rule is correct with regard to commissions or special legislative bodies, it must be true with regard to a regularly constituted legislative court having a certain definite jurisdiction, such as the Court of Claims.

In the case at bar there is no allegation that the requirements of due process were not observed, or that there was no evidence to support any of the findings.

2.

The Validity of a Patent in View of the Prior Art Is a Question of Fact.

The leading case on this subject is *Bischoff* v. *Wethered,* 76 U. S. 812-816. In that case this Court said:

> "It is, undoubtedly, the common practice of the United States Circuit Courts, in actions at law, on questions of priority of invention, where a patent

> under consideration is attempted to be invalidated by a prior patent, to take the evidence of experts as to the nature of the various mechanisms or manufactures described in the different patents produced, and as to the identity or diversity between them; and to submit all the evidence to the jury under general instructions as to the rules by which they are to consider the evidence. * * *"

Later the Court considers the objection that it is the province of the Court and not the jury to construe the meaning of documentary evidence, but holds that specifications of patents for inventions are documents of a peculiar kind, describing, as they do, mechanisms completely outside of themselves, so that their identity is a question of fact for the jury. The Court then refers to the change in the rulings in England on the same question, the courts in that country having first held that it was the province and duty of the Court to compare the documents and to decide on the identity or diversity of the inventions; but having later adopted the United States rule. The Court further held:

> "* * * It is not the *construction* of the instrument, but the *character of the thing invented,* which is sought in questions of identity and diversity of inventions." (Italics the Court's.)

So far as we are able to ascertain, this decision has never been overruled or substantially modified.

In *Royer* v. *Schulz Belting Co.,* 135 U. S. 319, the Court held that it was a question for the jury to pass upon whether the patented invention was of primary character and the patent a "pioneer patent."

Doubtless there are questions of validity which are questions of law. See *Heald* v. *Rice,* 104 U. S. 737-757, in which there was a question of identity of the invention described in an original patent and its reissue. This was held to be a matter of law for the Court because it involved merely a comparison of patents on their faces. It is to be noted, however, that this Court held that the ruling was consistent with the ruling in *Bischoff* v. *Wethered, supra.*

We are not overlooking this Court's decision in *Market Street Cable Railway Co.* v. *Rowley,* 155 U. S. 621, or its decision in *Singer Mfg. Co.* v. *Cramer,* 192 U. S. 275 (25 Sup. Ct. 291, 295).

In the first of these cases this Court said, on page 625:

> "* * * No extrinsic evidence was given or needed to explain terms of art, or to apply the descriptions to the subject-matter, so that the court was able, from mere comparison, to say what was the invention described in each, and to affirm from such mere comparison whether the inventions were or were not the same. * * *"

In *Singer* v. *Cramer, supra,* page 443, this Court said:

> "* * * As in each of the patents in question it is apparent from the face of the instrument that extrinsic evidence is not needed to explain terms of art therein, or to apply the descriptions to the subject-matter, and as we are able, from mere comparison, to comprehend what are the inventions described in each patent, and, from such comparison, to determine whether or not the Diehl device is an infringement upon that of Cramer, the question of infringement or no infringement is one of law, * * *."

These cases related to two very simple inventions coming under the *Heald* v. *Rice* decision (*supra*), where a question of validity or infringement was a mere matter of comparison.

In the present case, while the Court has not the full record before it, it is very evident from the findings and opinion that the case at bar is a very complicated one, involving, among other things, the laws of aerodynamics, requiring much expert evidence to elucidate. The findings show that lengthy wind-tunnel tests were made by the petitioner; that actual flight tests of airplanes were made by the petitioner and respondent and that testimony was adduced relating to early practical work by the respondent involving the use of the invention.

In view of the foregoing circumstances it seems clear that the rule in *Bischoff* v. *Wethered, supra,* should control this case and not the exceptions in *Heald* v. *Rice.*

3.

The Question of Infringement of a Patent Is a Question of Fact.

The leading case on this subject is *Stilz* v. *United States*, 269 U. S. 145, in which the Court said, on page 147:

> "Infringement is a question of fact. The quoted finding is in the nature of a special verdict of a jury (cases cited). This court accepts the findings of fact made by the Court of Claims and can not review them (case cited). And even where a finding determines a mixed question of law and fact, it is conclusive unless the court is able to separate the question to see whether there is a mistake of law. * * *"

In *Royer* v. *Schulz Belting Co., supra,* the Court held that it was a question for the jury to pass upon whether the defendant's machine infringed the claims of plaintiff's patent.

4.

The Question of Law, Presented in the Petition as Question 4, Is Fictitious.

The point of law presented on page 2 of the petition as Question 4 (and argued in paragraph (d) on page 12 of the petition) involves the statement that the claims covering the single control lever here under consideration were not inserted in the application until June 12, 1913, notwithstanding the fact that the application was filed on January 16, 1908. The question also states that during the intervening period such control lever came into general use in the United States and was described in printed publications. The foregoing statements of fact are clearly erroneous, and it is upon this erroneous statement that the law point presented is dependent.

The true state of facts is found in Finding VIII (Rec. pp. 10-12), from which it is clear that the application as presented involved not only a disclosure of the invention, but claims substantially defining it, and also that on Febru-

ary 1, 1909, the respondent presented two other claims (Nos. 2 and 13), of which claim 2 is as follows:

> "2. An aeroplane having distortable wings for maintaining transverse stability, a rudder for maintaining longitudinal stability, a lever controlling said wings and said rudder, a steering rudder, and a separate lever controlling said steering rudder."

This claim, as found by the Court (Finding VIII), is of sufficient breadth to include the petitioner's airplanes here in suit. The Court of Claims refers to "the broad monopoly as expressed in claim 2" (Rec. p. 56). It was never erased after its insertion by the first amendment of the application on February 1, 1909, and forms claim 2 of the patent held by the Court to be infringed (compare Finding VIII and Finding IX). Hence, the fact is that there was no long delay such as is set up in Question 4.

Furthermore, there was no intervening use in the United States during the period from the filing of the application to the insertion of claim 2 on February 1, 1909. A few planes were made in the United States at some undisclosed time between 1910 and 1911 (Finding XXXVIII, Rec. p. 32), but this was after the introduction of claim 2 into the application.

Under the principles of *Chapman* v. *Wintroath*, 252 U. S. 216; *Webster* v. *Splitdorf Co.*, 264 U. S. 463, and similar decisions, this Court has specifically held that the intervening use must be during the period of absence from the application of the claims in question and that such absence was of no legal effect unless it continued for a period of at least two years. At no time was the application for the patent in suit without claim 2 for a period as long as two years, it having been inserted about one year after the filing date of the application, January 16, 1908.

Claim 13, also inserted on February 1, 1909, was erased on May 23, 1912. But the claims in suit, which are of substantially the same scope as claim 13, were introduced approximately one year later and, hence, cannot be attacked under the doctrine of *Chapman* v. *Wintroath*, *supra* (Finding VIII, Rec. pp. 10-13).

5.

The Question of Law, Presented in the Petition as Question 5, Is Also Fictitious.

The second fictitious question of law is presented as Question 5 of the petition (p. 2) and argued at (e) petition (p. 13). This Court has answered this question completely in *Overland Motor Co.* v. *Packard Motor Co.*, 274 U. S. 417, in which one of the questions certified was as follows:

> "Did the applicant, in canceling the claim which was finally rejected on May 20, 1911, abandon such claim or estop himself from thereafter seeking it through a new application?" (p. 420).

On page 421 the Court said:

> "As the Patent Office by granting the patent must be held to have waived any objection to the application on the ground that the claim allowed had been rejected before by that Office, there is no reason why the appellees below should not be allowed to avail themselves of the waiver. We answer the first question in the negative."

On page 14 of the petition the petitioner states:

> "* * * where an applicant for a patent to cover a new combination is compelled by the rejection of his application by the Patent Office to narrow his claim by the introduction of a new element, he can not after the issue of the patent broaden his claim by dropping the element which he was compelled to include in order to secure his patent. * * *"

This may be instructive as a matter of patent law, but applies to nothing whatever within this case. Claim 13, as presented on February 1, 1909, is identical in substance with the claims here in issue. None of these claims has required any expansion whatever to cover the petitioner's airplanes. The claims in suit added no element which respondent was compelled to "drop" and none has been pointed out by petitioner. Furthermore, claim 2, as before stated, was con-

tinuously in the application from February 1, 1909 (Finding VIII) to the date of issue of the patent and is now in the patent and held to be infringed.

In view of the foregoing facts there can be no estoppel. Hence, there is no point of law left for consideration.

6.

The Question of Law, Presented in the Petition as Question 7, Is Also Fictitious.

Petitioner admits (Petition, p. 16) that under Section 4923, R. S. (U. S. C., Title 35, Sec. 72) if the patentee is an American his patent cannot be questioned because of anything which happens in a foreign country if the happening does not amount to a printed publication or a patent, but urges (Petition, p. 6; Assignment of Error 7) that where the patentee is a citizen of a foreign country the ruling should be different. This is an absurd contention. Section 4923 makes no distinction whatever between an American citizen and an alien. It would be distinctly judicial legislation to limit the provisions of this section to an American patentee. The provisions of this section constitute one of the oldest principles in the American patent law. Section 7 of the Patent Act of 1836 provides that a patent shall be allowed

> "* * * if * * * it shall not appear to the Commissioner that the same had been invented or discovered by any other person *in this country* prior to the alleged invention or discovery thereof by the applicant, or that it had been patented or described in any printed publication in this or *any foreign country.* * * *" (Italics ours.)

In the general revision of the patent statutes, approved June 22, 1874, Section 4886 provided that any person who had invented a device

> "* * * not known or used by others in *this country,* and not patented or described in any printed publication in this or any *foreign country,* before his invention or discovery thereof * * *" (italics ours)

might obtain a patent.

Substantially the same provisions exist to-day in Section 4886 (U. S. C., Title 35, Sec. 31), which provides that any person may obtain a patent if the invention is

> "* * * not known or used by others in *this country,* before his invention or discovery thereof, and not patented or described in any printed publication in this or any *foreign country,* before his invention or discovery thereof * * *." (Italics ours.)

Petitioner, by its 7th assignment of error (Petition, p. 6) as elaborated (Petition, 4(g), p. 16), is apparently seeking from this Court a ruling which would amount to a judicial amendment of one of the most ancient and plainest provisions of our patent law.

We submit that the petitioner here is limited to the three points of law which it has presented. None of them can be properly based on the findings of fact in this case.

There were no special conclusions of law made by the Court, and the points which have been presented were apparently extracted by the petitioner in an endeavor to conform to the rule that only questions of law will in any event be considered by this Court on writs to the Court of Claims.

All of the other alleged errors relate to questions of fact and are not reviewable here.

7.

This Case Involves Nothing but the Questions of Validity and Infringement.

It follows from the foregoing discussion that with the fictitious questions of law out of the case, as they should be, nothing remains except the fact questions of validity and infringement. These questions were determined by the Court of Claims on most voluminous evidence. If any other law points arose in the Court of Claims decision, the petitioner evidently agrees with that Court's conclusions regarding them, *since petitioner has not raised any objection thereto.*

Reasons Alleged for Granting the Writ.

The petitioner alleges four reasons for granting the writ, these being as follows:

> 1. That the decision in *Esnault-Pelterie* v. *Chance Vought Corporation,* 66 Fed. (2d) 474, conflicts with the Court of Claims decision in the case at bar;
>
> 2. The "momentous importance of this case both to the Government and to the entire aircraft industry";
>
> 3. The avoidance of a costly accounting proceeding if a writ of certiorari is presented at this stage of the case; and
>
> 4. The errors in the Court of Claims decision.

We will examine these briefly under similar headings.

Esnault-Pelterie v. *Chance Vought Corporation.*

We submit that the decision in the *Chance Vought* case has no bearing whatever upon the question of review by this Court of the case at bar.

This case is a Court of Claims case, and governed by the statutes and decisions relating to Court of Claims cases (considered at pp. 3-4, *supra*).

The Court of Claims is a *legislative Court,* not acting under the Third Article of the Constitution, and the power of review of this Court over its judgments is strictly limited (*Williams* v. *United States,* 289 U. S. 553-581).

The statutes and decisions with regard to cases in the Circuit Courts of Appeal are very different. Circuit Courts of Appeal are *constitutional courts,* as to which the power of review possessed by this Court is practically unlimited.

Section 347 of the United States Code (U. S. C., Title 28) provides:

> "(a) In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the

> Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Under this statute all evidence, questions of fact, questions of law, and mixed questions are subject to investigation and review by this Court. Any cause can be brought before the Court at any stage in the proceedings.

It is, hence, entirely within the scope of review of this Court to inquire minutely into the facts, decide on the credibility of witnesses and weight of evidence, and settle all questions once for all which are present either in the facts or the law.

Under this power this Court has for many years, almost as a matter of course, certified to it patent cases involving conflicting decisions of the several courts of appeal.

But where, under a statute such as Section 288 of the Judicial Code, this Court may not inquire into the facts, the existence of another decision on other evidence in another case cannot, we submit, alter the power of review of this Court.

We find no decision of this Court to the contrary.

The state of facts in the case at bar is highly illustrative. This case has been pending over ten years; the facts were very carefully adduced and fully considered. The findings were initially made by a commissioner of the Court of Claims and largely adopted, without dissent, by the five Judges composing that Court. The Court of Claims has painstakingly gone over all of the evidence before it, which was voluminous. It has with meticulous care considered each and every point raised by the petitioner and has written an exhaustive and illuminating opinion. As shown by the transcript of record, the findings of fact and opinion of the Court occupy nearly seventy closely printed pages.

The decisions of the District Court and Court of Appeals in the *Chance Vought* case were fully argued and briefed before the Court of Claims, and that Court, on pages 61, 62, 66 of the transcript of record, concludes that the evidence before the Court of Appeals must perforce have been very different in most important respects from the evidence before the Court of Claims.

It was certainly open to Congress to provide that whenever a decision of the Court of Claims was at variance with a decision in any of the Federal Courts of Appeal, the Supreme Court should review the entire case, facts and law, on the full record. But Congress has not chosen to do so. It has made the findings of the Court of Claims final and, unless it has committed an error of law reviewable by this Court, the United States is committed to its decisions.

This Case Is Not of "Momentous Importance Both to the Government and to the Entire Aircraft Industry."

Of course this case is of importance to the Government in that it is facing payment for values which it has taken from the respondent, a large part of the taking being after due notice (Finding XX, Rec. p. 22). But this is the ordinary "importance" which attaches whenever the Government infringes a patent. Before February 13, 1925, Congress deemed cases of infringement of patents to be important enough to be subject to the review of this Court as a matter of right. Since that date, however, Congress is content to take the final judgment of the Court of Claims where it has committed no error of law. Our understanding is that this Court rarely, if ever, grants a writ of certiorari solely on the ground that the case is of importance to the defeated adversary. There must be, as we understand it, some general and substantial question of public interest, even in those cases where the power of review of this Court is absolute. (See *Layne & Bowler Corp.* v. *Western Well Works, Inc., et al.*, 261 U. S. 388.)

The practical importance of the patent in suit to the aircraft industry or anyone else in the United States is *nil.*

The patent expired approximately four and a half years ago (on November 3, 1931), and there are no suits pending other than the suit at bar. While, theoretically, this respondent could bring an action or actions at law covering the very short period of infringement left by the statute of limitations, the period of time covered is so small that such an action or actions would probably not pay for the bringing. This is particularly true when it is borne in mind that each action at law would require the aid of a suit in equity.

Such an interest on the part of the public is not substantial. But, even if it were, it is not seen how it could modify the provisions of Section 288 (U. S. C., Title 28) or overturn the clear decisions of this Court.

Grant of Petition Upon Interlocutory Judgment.

In its decision in this case, dated November 4, 1935, the Court of Claims filed its findings of fact and a single conclusion of law to the effect that plaintiff was entitled to recover (Rec. p. 5, par. 5), the parties having previously stipulated (Finding XXIII [misnumbered XXVIII], Rec. p. 25) that the accounting should be deferred until after adjudication by the Court of Claims of the questions of validity and infringement. For this reason no judgment of the Court of Claims was made at that time, it not being the custom of that Court to enter interlocutory judgments.

The defendant then moved the Court to enter an interlocutory judgment, giving as its reason for such judgment that it desired to petition this Honorable Court for a writ of certiorari without waiting for the accounting and final judgment. Based solely upon this showing of expediency, the Court of Claims granted the motion and entered the interlocutory judgment shown on page 75 of the record.

There thus arose the question of whether or not an interlocutory judgment of the Court of Claims is such a judgment as is contemplated by Section 288 (U. S. C., Title 28), or whether a judgment of that Court is unreviewable by this Court unless it is a final judgment.

If the respondent's position is of any consequence in the determination of this question by this Court, then respondent waives any objection to the timeliness of this petition; respondent believes that if a review by this Court is proper at all, there is no good reason why a long accounting proceeding should be conducted in advance of such review.

But respondent believes that the only question of law presented, as stated in the Court of Claims original conclusion, is whether or not the respondent, having a valid and infringed patent, should recover. This, of course, in reality is no question at all, since it is provided for in the statute.

Alleged Errors of the Court of Claims.

A discussion of alleged errors commences on page 9 of the petition and extends to page 17. It runs parallel with the specifications of errors on pages 5, 6 and 7 of the petition. We will reply, giving the number assigned to each individual specification of error and the letter of the paragraph, "(a)" to "(h)," which applies to the elaboration of each. Where our reply would duplicate previous discussions in this brief, we will so indicate.

1st Error, Paragraph (a). This relates wholly to a question of *fact*,—namely, that of validity. The facts are found regarding the Wadsworth patent in Finding XXXII, Rec. p. 30; Weeber, Finding XXXIII, Rec. p. 30; Wilson, Finding XXXVI, Rec. p. 30; Simpson, Finding XXXVII, Rec. p. 31. These patents were fully considered in the Court of Claims opinion: *Wadsworth,* Rec. p. 55; *Weeber,* Rec. p. 65; *Wilson,* Rec. p. 65; and *Simpson,* Rec. p. 64.

The art relating to airplanes was considered by the Court as follows: *Laroze,* Finding XXVIII, Rec. p. 28; *Penaud & Gauchot,* Finding XXV, Rec. p. 26; *Macedo,* Finding XXVII, Rec. p. 27; *Schüssler,* Finding XXIX, Rec. p. 29; *Jung,* Finding XXX, Rec. p. 29; *Davidson,* Finding XXVI, Rec. p. 26; and *Quentin,* Finding XXXV, Rec. p. 31. They were considered by the Court in its opinion as follows: *Laroze,* Rec. p. 62; *Schüssler,* p. 63; *Penaud & Gauchot,* p. 66; *Macedo,* p. 66; *Jung,* p. 66; *Quentin,* p. 66; and *Davidson,* p. 66.

2nd Error, Paragraph (*c*). This relates to a question of *fact*,—namely, the scope of the claims in suit,—and, as such, is not reviewable. It is referred to in Finding XXI, Rec. p. 22, and Finding XXII, Rec. p. 24; also in the opinion, Rec. pp. 71-75.

3rd Error, Paragraph (*b*). This relates wholly to a question of *fact*,—namely, the question of validity of the patent in suit over respondent's first French patent. It is referred to in Finding IV, Rec. pp. 7 & 8; also in the opinion, Rec. pp. 41-44.

4th Error, Paragraph (*d*). This has already been fully discussed, *supra*, page 7. While, ostensibly, a point of law, it is based upon alleged statements of facts which are untrue, and the true facts admit no such legal question.

5th Error, Paragraph (*e*). This has already been discussed *supra*, page 9. A comparison of, say, claim 5 or 6 with claim 13, which was erased, will show that the patented claims are substantially the same as the erased claims; their reinsertion was permitted by the Patent Office, and the action of the Patent Office is not reviewable. If the Patent Office had refused to permit their reintroduction, it would be on the theory of a species of *res judicata*. The doctrine of estoppel has no application.

6th Error, Paragraph (*f*). This is a question of *fact* which the Court of Claims has disposed of completely (Findings XVI, XVII and XVIII, Rec. pp. 20, 21 and 22). The criticism is not based upon the joy-stick combination set forth in the patent, but upon incidental and negligible crossed responses. All airplanes, even the most modern, have such crossed responses. They are inevitable. The 6th error is merely a trumped-up argument made for the purpose of this suit. It was proven false by test flights of plaintiff's ring-tail structure (Finding XVII, Rec. p. 21); see Record, page 75, where the Court disposed of it completely.

7th Error, Paragraph (*g*). This is a point of law completely disposed of on page 10, *supra*.

8th Error, Paragraph (h). This relates to the question of infringement, which is a question of fact. As we have before pointed out, the Court of Claims held that on the facts of the case there was infringement. The Government planes have all of the elements of the patented claims in issue, which elements operate in the same manner to produce the same result. Each of the Government planes has a single vertical lever movable in all directions: lateral stabilizing organs, which comprise hinged ailerons whose function it is to distort the aerodynamic effect of the wings; a longitudinal stabilizing organ, in the ancient form of a horizontal hinged elevator; the lateral and longitudinal stabilizers being both operated by a single joy-stick under the control of one hand of the pilot, so that the plane may be stabilized as to its lateral or longitudinal attitude, or as to any intermediate or compound attitude, by a single movement of the joy-stick. The Government planes have the simple and very effective responses described in the patent, so that the plane follows the tilt of the stick. Notwithstanding the petitioner's criticisms of instinctive operation, the Government has never built a plane or had one built for it, so far as this record shows, which did not utilize respondent's instinctive mode of operation. The claims in suit read directly and positively, without any expansion or broadening whatever, upon the Government structures. A plainer case of infringement has seldom been before the courts (see Findings XXI and XXII, Rec. pp. 23 and 24).

The *Chance Vought* Decision, Being on a Different Record, Has No Bearing on the Case at Bar.

The decision of the Court of Appeals, speaking through Judge Manton, was thoroughly argued before the Court of Claims. On page 61 of the Record, the latter Court stated as follows:

> "From the statements of facts in both opinions we are confirmed in our belief that the record before this court must be in some important particulars very different from what it was before the courts mentioned (District Court and Court of Appeals)."

The Court of Claims then points out several very important differences. These differences have to do with the applicability of the respondent's first 1906 patent, the operability of the patent in suit and the extent of use of the invention.

If the Court of Appeals decision had been *based upon the facts as adduced in the case at bar it would be completely and manifestly erroneous.* Statement after statement is negatived by the evidence in this case. As illustrations, the following statements from the Court of Appeals decision are found to be incorrect under the evidence in the case at bar; they are illustrative only:

> That the right-hand lever of the patent is the same in function and operation as the right-hand lever of respondent's 1906 French patent (see Finding IV, Rec. pp. 7, 8; Op., Rec. p. 41);
>
> That the actions of the steering rudder and elevator in the patent are interdependent (Finding XVII, Rec. p. 21; Op., Rec. p. 74);
>
> That the "bird-tail" construction of the patent in suit steers right or left, sometimes in response to corresponding, and sometimes in response to opposite, movements of the steering lever (Finding XIV, Rec. p. 8; Op., Rec. p. 45);
>
> That the equilibrium of respondent's first French patent may be controlled by the pilot with one hand (Finding IV, Rec. p. 8; Op., Rec. p. 43);
>
> That two out of three of the embodiments of the patent do not involve instinctive control (Finding XIII, Rec. p. 16; Op., Rec. p. 49);
>
> That instinctive control was not used by the patentee (Finding VI, Rec. p. 9);
>
> That the Laroze control could be operated by one hand (Finding XXVIII, Rec. p. 28; Op., Rec. p. 62);
>
> That the Ferber publications show any operating mechanism whatever (Finding XL, Rec. p. 33; Op., Rec. p. 67);
>
> That turning the lever of respondent's first French patent to a vertical position would make it operative (Op., Rec. p. 59);

That the infringing machine has inherent stability, requiring no hand-controlled stability (Findings XXI and XXII, Rec. pp. 22-24; Op., Rec. pp. 73-74);

That the joy-stick has not gone into extended use (Finding XLVII, Rec. p. 37; Op., Rec. p. 60).

The findings of the Court of Claims establish the incorrectness of these and other statements of the Court of Appeals decision.

Meritorious Character of the Invention in Suit.

As is apparent from the findings of fact and opinion of the Court of Claims, the invention in suit introduced for the first time in the art:

(1) An airplane control in which the equilibriums were under a single hand and required but a single mental concept to alter the position of the plane from any attitude which was not wanted to any attitude which was required in the exigencies of flight;

(2) An instantaneous control of equilibrium, free from all confusion, which left one hand available for other essential purposes;

(3) A control in which the movement of a single lever toward the high part of the plane would guide it back to normal attitude, or, in other words, one in which the tilt of the plane followed the tilt of the stick; and

(4) A control in which the pilot was not fighting his balancing instincts, but, on the contrary, took advantage of them, so that a balancing motion of the pilot's body carried with it the control stick in a direction to correct improper attitudes of the plane.

No prior art patent showed any one of these advantages. The petitioner's planes have always used this identical mechanism operating in precisely the same way, the differences in construction being merely those of mechanical details.

The Decision of the Court of Claims.

This Court will undoubtedly compare the opinion rendered by the Court of Claims in the case at bar with the opinion of the Court of Appeals in the *Chance Vought* case. We welcome any comparison.

The Court of Claims opinion, written on the facts which it had before it, is unusually complete, meticulously careful, and we think intrinsically convincing that no careful Court, upon the evidence in the case at bar, could have arrived at any other conclusion as to facts and law than those which were adopted.

CONCLUSION.

It is submitted—

(1) That the facts found by the Court of Claims, including the facts of validity and infringement, are not subject to review;

(2) That respondent has referred to no real errors of law which would justify the issuance of the writ asked for;

(3) That the decision in the *Chance Vought* case, being based upon radically different facts, constitutes no reason for the issuance of the writ;

(4) That there is no question of law, either proposed or inherent, which is of any public interest whatever;

(5) That the interests of the defendant are merely those of a defeated litigant, and that there is no sub-

stantial right remaining in this respondent which could become of importance to the public at large;

(6) That the petition should be denied.

Respectfully submitted,

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